No. 91-778

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

LEONA HELMSLEY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

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INTRODUCTION

The principal issue presented in the petition is whether, in a non-perjury prosecution, the government may use evidence that was derived from the defendant's prior immunized testimony. As the petition shows, the Second Circuit's rejection of the straightforward causal-linkage test for answering that question set forth by this Court in *Kastigar v. United States*, 406 U.S. 441 (1972), squarely conflicts with the decisions and express rationales of numerous other courts of appeals, including, notably, *United States v. North*, 910 F.2d 843 (D.C. Cir.), *modified*, 920 F.2d 940 (1990), *cert. denied*, 111 S. Ct. 2235 (1991).[1] Nothing in the government's brief undermines that showing.

Except for *North*, the government merely asserts that the circuit court decisions are different (Opp. 17 n.12, 19 n.14), but does not explain why any factual differences are relevant to distinguishing the basic causal-linkage rationale of those decisions. And the government's attempt to distinguish *North* (Opp. 16-18) is patently inadequate: first, it ignores the broad causal-linkage standard that was self-evidently the central rationale of *North* (*see* 910 F.2d at 859-68; 920 F.2d at 942-43); second, it mischaracterizes as mere *dicta* the *North* court's repeated *ruling* that *Kastigar* is violated when the government uses a witness who came forward as a result of exposure to

[1] *See, e.g., United States v. Serrano*, 870 F.2d 1, 14-15 (1st Cir. 1989); *United States v. Semkiw*, 712 F.2d 891, 894 (3d Cir. 1983); *United States v. Pantone*, 634 F.2d 715, 723 (3d Cir. 1980); *United States v. Brimberry*, 803 F.2d 908, 915-17 (7th Cir. 1986), *cert. denied*, 481 U.S. 1039 (1987); *United States v. Brimberry*, 744 F.2d 580, 586-87 (7th Cir. 1984); *United States v. First W. State Bank*, 491 F.2d 780, 786 (8th Cir.), *cert. denied*, 419 U.S. 825 (1974); *United States v. McDaniel*, 482 F.2d 305, 311 (8th Cir. 1973); *United States v. Crowson*, 828 F.2d 1427, 1430 (9th Cir. 1987), *cert. denied*, 488 U.S. 831 (1988); *United States v. Hampton*, 775 F.2d 1479, 1488 (11th Cir. 1985).

immunized testimony (910 F.2d at 865; 920 F.2d at 942-43);[2] and third, it turns on its head the plain fact that it is a graver, not a lesser, Fifth Amendment violation when the government uses a witness whose *entire* testimony would be unavailable but for the immunized testimony (as occurred here) than when it uses a witness only *part* of whose testimony was derived, through refreshed recollection, from immunized testimony (which the government acknowledges *North* holds unconstitutional).

There thus can be no doubt that the Fifth Amendment law of the D.C. Circuit (not to mention other circuits) is squarely contrary, in a result-altering way, to the law announced by the Second Circuit in the present case. Now is the time, and this is the case, to resolve this conflict—and, more generally, to provide the lower courts much-needed guidance on the application of *Kastigar*, an issue that arises in countless state and federal investigations. *See McCleskey v. Zant*, 111 S. Ct. 1454, 1471 (1991) (noting importance of this Court's establishing clear rules so as "'to preclude individualized enforcement of the Constitution in different parts of the Nation'"). Indeed, this Court will soon receive a certiorari petition by the Independent Counsel seeking review of the D.C. Circuit's recent decision in *United States v. Poindexter*, No. 90-3125 (Nov. 15, 1991), where the Court reaffirmed the broad principles of *North* and found a violation of *Kastigar*.[3]

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[2] Even the Independent Counsel, representing the United States, recognized in his petition for certiorari in *North* that the D.C. Circuit's direction for remand required an examination of whether any witnesses against North had been motivated to come forward by North's immunized testimony. *See* 90-1337 Pet. 8 n.3 (in opinion on rehearing, *North* court "added another element to the showing required on remand: whether government witnesses were motivated to testify by the immunized testimony").

[3] *See* Independent Counsel's Response to Appellant Poindexter's Petition for Rehearing at 5-6 (filed Jan. 17, 1992) (noting Independent Counsel's intent to seek certiorari on the D.C. Circuit's

The recent decisions in *North* and *Poindexter* underscore not only the ripeness but the importance of the issue for review. It is intolerable, as a matter of both the reality and the appearance of equal justice, that high government officials like North and Poindexter should receive the benefit of a proper construction of Fifth Amendment immunity law, while other, less popular defendants, like Mrs. Helmsley, do not. *See Patterson v. McLean Credit Union*, 485 U.S. 617, 619 (1988) ("the claim of any litigant for the application of a rule to its case should not be influenced by the Court's view of the worthiness of the litigant in terms of extralegal criteria"). To eliminate this basic inequity, and to resolve a clear and important intercircuit conflict, the Court should grant this petition—or, at a minimum, hold it for consideration in conjunction with the forthcoming petition in *Poindexter*.

ARGUMENT

1. The government recognizes, as did the court of appeals and district court, that "petitioner's immunized state grand jury testimony was a cause-in-fact of this prosecution and that the testimony led to discovery of certain evidence against her." Opp. 13; Pet. App. 15a, 88a. Under the simple and straightforward causal-link test that this Court and other courts of appeals have consistently articulated for determining whether immunized testimony is being used "directly" or "indirectly" to incriminate the immunized witness (*Kastigar*, 406 U.S. at 453),[4] petitioner's immunized testimony was improperly used against her, and the court of appeals' contrary holding was wrong. The government nevertheless attempts to defend the court of appeals' ruling,

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immunity ruling as well as on its ruling that 18 U.S.C. § 1505 is unconstitutionally vague).

[4] *See Doe v. United States*, 487 U.S. 201, 208 n.6 (1988) (asking if testimony is a "'link in the chain of evidence'" tending to prove crime); *Hoffman v. United States*, 341 U.S. 479, 488 (1951); *see also* note 1, *supra* (selected court of appeals cases).

but that attempt is patently defective and merely confirms the need for review.[5]

Trying to make this case appear *sui generis*, the government resorts to a remarkable claim about Fifth Amendment law: that even a *proven* causal chain connecting compelled, immunized testimony to evidence incriminating the testifying witness in a crime is insufficient to raise a Fifth Amendment problem if (a) the incriminating evidence came from an individual who was moved to come forward as a result of the immunized testimony and (b) the subsequently charged offense is "unrelated" to (involves a different "subject matter" than) the conduct directly described in the immunized testimony. Opp. 18, 16; *id.* at 14-16.[6] But the govern-

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[5] As a preliminary matter, we note that, contrary to the government's suggestion (Opp. 13), nothing in *United States v. Apfelbaum*, 445 U.S. 115 (1980), rejects or modifies the clearly established causal-linkage test for non-perjury prosecutions. *Apfelbaum* involved perjury committed in the course of immunized testimony. The Court explained that perjury has long been recognized as a special case: because a witness cannot "incriminate" herself (*i.e.*, lead to evidence of a crime) except through what she was testified *about*, crimes such as perjury, which have not occurred prior to the testimony but instead are committed by the testimony itself, are outside the Fifth Amendment and hence beyond the protection of any use immunity. 445 U.S. at 117, 128. Thus, when *Apfelbaum* noted that use immunity does not bar all evidence that would be unavailable "but for" immunized testimony (445 U.S. at 125-26)—and that a witness is not always to "be treated as if he had remained silent" (*id.* at 124)—it meant simply that immunity does not extend to crimes like perjury where the testimony *is* the crime. The government, of course, has never contended that this is such a case.

[6] The government's brief also hints that it was not the *substance* of petitioner's immunized testimony that was used to produce evidence against her. *See* Opp. 14, 15. In the end, however, the government rightly never makes this suggestion explicit, because the decision below accepts, for its ruling, the allegations that it *was* petitioner's testimony—and not the mere fact of her physical appearance before the grand jury—that was used to produce evidence against her in the present criminal case. *See* Pet. App. 15a, 88a. (Indeed, the government concedes as much in recognizing the chain of causation from petitioner's "testimony" to this prosecution. Opp. 13;

ment neither can nor does cite any case that adopts this proposition. *See* Opp. 14-16. And the contention is fundamentally wrong, and in conflict with established law, at every turn.

First, the notion that motivation of a witness to come forward to testify is exempt from the ordinary chain-of-causation test is flatly contrary to the rulings of at least the Seventh Circuit (*Brimberry, supra*), the Eleventh Circuit (*Hampton, supra*), and the D.C. Circuit (*North, supra*). Each of the cited decisions both states and holds that *Kastigar* prohibits use of a witness whose testimony became available, *i.e.*, who was motivated to testify, as a result of immunized testimony. The government can cite no precedent holding otherwise, precisely because those rulings follow directly from the *Kastigar* causation inquiry: motivation of a witness is simply one mechanism, like discovery of a weapon or development of an investigatory lead, by which immunized testimony might lead to incriminating evidence. Any attempt to carve out this category of causal connections would be not only contrary to precedent but arbitrary.

Second, the government's "relatedness" limitation on *Kastigar* claims is likewise wrong. This Court and the lower courts have consistently articulated the test for prohibited derivative use as a simple, familiar causation inquiry—was the evidence independently produced or was it produced as a result of the compelled immunized testimony?—without any limitation as to the "relatedness" of the substance of the testimony and the subsequently used evidence. *See* pages 1, 3 & notes 1, 4, *supra*. If a causal link is established, it is entirely arbitrary nevertheless to permit the use of immunized testimony under a categorical "relatedness" exemption: as the Third Circuit explained, "the crucial inquiry for safeguarding derivative use immunity is, by definition, whether the

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id. at 4-5, 15.) That premise, of course, is compelled at this stage of the case: petitioner has alleged that it was her leaked grand jury testimony that led to this investigation and prosecution; and there has been no factual hearing to test those allegations.

testimony was *used*, not whether it is *related*." *United States v. Pantone*, 634 F.2d at 721.[7] In fact, the limitation of immunity to "related" crimes would do nothing less than replace the constitutionally required standard of *use-and-derivative-use* immunity (*see Kastigar*) with some version of the now-rejected, constitutionally insufficient standard of *transactional* immunity alone.[8]

The government's "relatedness" standard is also intrinsically defective, both in general and (for the government's purposes) as applied here. The standard is so vague and indeterminate that it is hard to know what it means. If narrow in meaning, it is patently inconsistent with established law.[9] Yet, if the standard is

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[7] If a defendant is charged with a crime that is "unrelated" to the substance of earlier immunized testimony, it seems *less likely* that there will be a chain of causation connecting the two. But that is merely a question of proof, not a justification for making any such proof legally irrelevant. And here, of course, the chain of causation is actually present—established by petitioner's allegations (supported by evidence and never subjected to a factual hearing).

[8] Transactional immunity is both broader than use immunity (it would bar a prosecution for testified-about conduct even if the government's proof was independently derived) and narrower (it would not bar immunized testimony about one transaction from being used to prosecute other transactions).

[9] "Unrelated" offenses cannot be merely different offenses: otherwise, immunized testimony about state crimes could be used to prove federal crimes, contrary to *Murphy v. Waterfront Comm'n*, 378 U.S. 52 (1964). Different conduct and even different transactions cannot be enough either. *See, e.g., United States v. Kurzer*, 534 F.2d 511 (2d Cir. 1976); *Brimberry, supra* (7th Cir.). Different investigations cannot suffice: even aside from the *Murphy* rule on state-federal immunity, the Fifth Amendment bars use of testimony even when there is no investigation of the *witness* at all at the time of his or her testimony (*Kastigar*, 406 U.S. at 460 (improper use to focus investigation on witness)), and it also bars use of compelled testimony even if there is no criminal investigation by the government at all, for the privilege may be claimed in civil proceedings if the answers may tend to incriminate in some not-yet-begun criminal prosecution (*e.g., Pillsbury Co. v. Conboy*, 459 U.S. 248 (1983); *Lefkowitz v. Cunningham*, 431 U.S. 801 (1977); *Lefkowitz v. Turley*, 414 U.S. 70 (1973)).

broad enough to avoid an obvious conflict with established law, the present case seems to meet the standard: at least in the government's view, the sales-tax fraud at issue in petitioner's immunized testimony was sufficiently "related" to the income-tax fraud charged here that it would apparently have been admissible in this case (on the issue of intent). *See, e.g., United States v. Blood*, 806 F.2d 1218 (4th Cir. 1986); *United States v. Johnson*, 634 F.2d 735 (4th Cir. 1980), *cert. denied*, 451 U.S. 907 (1981). As important, the witnesses who came forward against petitioner apparently also viewed the two tax matters as related.

Finally, in defending its motivation and relatedness standards for determining improper use of properly immunized testimony, the government's insistence that a court look back in time to review the witness's original entitlement to the privilege is wholly misguided, for two reasons. Opp. 15-16. Initially, the government is viewing the use-immunity question from the wrong end of the telescope. It is clear that if a witness's invocation of the Fifth Amendment privilege is denied and she is thus compelled to testify, the Fifth Amendment unequivocally precludes use of the compelled testimony, or evidence derived from the testimony, in a criminal case against the witness. *See, e.g., Adams v. Maryland*, 347 U.S. 179, 181 (1954); *Miranda v. Arizona*, 384 U.S. 436 (1966); *Harrison v. United States*, 392 U.S. 219 (1968); *United States v. Bayer*, 331 U.S. 532 (1947); 8 *Wigmore on Evidence* § 2270, at 417 nn.6, 7 (McNaughton rev. 1961). When incrimination actually occurs as a result of compelled testimony, it is irrelevant whether, at the time the privilege was claimed, a court determined that what was at that time only a potential for incrimination seemed too slight to warrant recognition of the privilege. Indeed, the government's view would produce the bizarre result—particularly odd in the typical case where there never has been a denial of any claim of privilege [10]—that

[10] Claims of privilege under the Fifth Amendment are commonly recognized, or immunity is granted automatically (by statute, when

courts facing *Kastigar* issues would have to conduct a counterfactual inquiry looking back in time at what seemed the potential for incrimination when the witness testified, even where the court knows that the incrimination actually occurred. No court faced with a *Kastigar* issue conducts such an inquiry. *See* note 1, *supra.*

In any event, the well-established standard for judging whether a witness may claim the privilege contains neither the witness-motivation limit nor the related-crime limit the government tries to engraft onto it. Giving the Fifth Amendment a necessary "liberal construction," that standard simply requires that the witness have, beyond a speculative or fanciful fear of incrimination, "reasonable cause to apprehend danger" from testifying because the testimony "would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime." *Hoffman*, 341 U.S. at 486; *see Malloy v. Hogan*, 378 U.S. 1 (1964); *Pillsbury Co.*, 459 U.S. at 266 n.1 (Marshall, J., concurring). This well-established test focuses only on the speculative nature, as a straightforward factual matter, of the alleged incrimination as to *any* crime, and has never been restricted by the categorical limits on type of crime or type of causal chain that the government proposes. This case, of course, far from involving any fanciful claim of incrimination, involved incrimination that actually occurred: incriminating evidence actually resulted from petitioner's immunized testimony.[11]

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subpoenaed to testify) without any claim having to be made. Here, for example, petitioner automatically received immunity before the state grand jury. And in any event, there is doubt that petitioner would have had a valid claim of privilege for her grand jury testimony.

[11] Contrary to the government's suggestion, rejection of the limits its proposes would not authorize recognition of the privilege, or use immunity, for any testimony "no matter how lacking in the potential to incriminate." Opp. 15 & n.11. The *Hoffman* standard on its face requires more than a bare "concern" about incrimination; and the standard for use immunity requires that there be a genuine chain of causation (that the government not have independent sources for

In sum, the government's attempt to defend the court of appeals' decision rests on an unprecedented, unworkable, and improper rewriting of accepted Fifth Amendment law. The weakness of the attempt demonstrates the incompatibility of the decision below with the established law of this Court and other courts of appeals. The *Kastigar* issue should be reviewed in this case.

2. In defending the Second Circuit's reliance on the "doctrine of election" to uphold petitioner's conviction for tax evasion, the government acknowledges that this Court has never sanctioned use of that doctrine in a criminal case. Opp. 20-21. Indeed, the government cites *no* decision applying the doctrine in a criminal case where a taxpayer's return used a legally impermissible tax method. *Id.* at 21.[12] And the government's opaque attempt (*id.* at 24) to distinguish the Fourth Circuit's decision in *United States v. Wilkins*, 385 F.2d 465 (1967), *cert. denied*, 390 U.S. 951 (1968), only confirms that the case is indistinguishable.

On the merits, the government's defense rests simply on the unsupported assertion that a "deficiency" occurs when a "taxpayer reports or pays less than the amount due, *given the manner in which he has treated his affairs for tax purposes.*" Opp. 21. But this redefinition is flatly inconsistent with the tax evasion statute, 26 U.S.C. § 7201: regardless of how "he has treated his

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its incriminating evidence). Indeed, those standards *do* make it less likely that a Fifth Amendment problem will be found in "unrelated-crime" or "witness-motivation" cases. But that, again, is simply a matter of factual proof, not a matter for categorical exclusion where, as here, the proof is present.

[12] The government cites *United States v. Santarelli*, 778 F.2d 609 (11th Cir. 1985), but that case, like the *Fowler* case discussed in our petition (Pet. 22), involved a taxpayer's election of a legally *proper* method of calculating income tax due. (The government also cites *Kleifgen*, but that decision's reference to the doctrine is pure *dictum*.) The *Fowler/Santarelli* situation is critically different from the present situation, because no concept of "tax due" can be calculated using a legally impermissible method of reporting.

affairs," a taxpayer cannot evade or defeat a "tax imposed by this title" (26 U.S.C. § 7201) if there is no deficiency under the only methods of calculating the tax permitted by Title 26. Not surprisingly, therefore, the government's position would dramatically alter accepted law and practice in tax evasion cases by precluding any defense of untaken required deductions that offset underreporting of income—a result that not even the government has overtly urged. And that result is factually, functionally, and legally identical to treating the taxpayer's pre-indictment actions as relieving the government of its burden of proving the deficiency element in an important class of tax evasion cases, squarely contrary to the recently reaffirmed rule that the government always must prove all elements of an offense. *See Estelle v. McGuire*, 112 S. Ct. 475, 481 (1991); *Mathews v. United States*, 485 U.S. 58, 64-65 (1988).

Because the jury was permitted to convict on the erroneous "doctrine of election" theory, in conflict with the law of this Court and of the Fourth Circuit, review should be granted, and the judgment reversed, on this issue as well.

CONCLUSION

The petition for a writ of certiorari should be granted. Alternatively, the petition should be held and considered together with the forthcoming petition for a writ of certiorari in *United States v. Poindexter*.

Respectfully submitted,

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